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No. 86-1674

In the Supreme Court of the United States

OCTOBER TERM, 1987

MILDRED HESTERMAN, EXECUTRIX OF THE ESTATE OF LEONARD HESTERMAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly applied California law in ruling that petitioner had failed to acquire good title to certain disputed property.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A20-A30) and the judgment order of the district court (Pet. Supp. App. A38-A40) are unreported. The prior opinion of the court of appeals (Pet. App. A1-A19) is reported at 705 F.2d 1487, and the prior opinion of the district court (Pet. Supp. App. A31-A35) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 10, 1985. A motion for leave to file an untimely petition for rehearing was granted, and the petition for rehearing was denied on January 14, 1987. The petition for a writ of certiorari was filed on April 14, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Catherine Bazinett died in September 1970, and Joseph Bazinett, her husband, died in May 1971. In December 1972 the IRS made gift tax assessments against both estates, and in early 1975 the IRS made estate tax assessments against both estates. Pet. App. A3-A4. When the estates failed to pay these taxes, liens automatically arose in favor of the United States upon all of the estates' property. See Internal Revenue Code (26 U.S.C.) §§ 6321, 6322 (the Code or I.R.C.). In addition to these general liens, a special lien for estate taxes also arose pursuant to Section 6324(a)(1) of the Code when those taxes were not paid. The special estate tax lien encumbers all property in the decedent's gross estate "for 10 years from the date of death" (I.R.C. § 6324(a)(1)).

The Bazinetts' estates held an interest in a gas station located in California. In 1971, the Bazinetts' executor received permission from the probate court to lease the gas station. In July 1974, the executor received permission from the probate court to execute a deed of trust and assignment of rents from the gas station in favor of the United States. The executor made this assignment in order to secure payment of the unpaid gift taxes, and the IRS in return agreed to forbear from foreclosing on its gift tax liens (Pet. App. A4-A5). Notwithstanding the assignment, the executor in January 1975 conveyed the gas station, as well as the estates' rights under the lease agreement, to Leonard Hesterman, whose estate is petitioner here. Hesterman had actual knowledge of the government's tax liens at the time (*id.* at A8). Contrary to provisions of the California Probate Code, the executor failed to obtain the consent of the probate court for this transaction with Hesterman (*id.* at A5, A12).

The lessee of the gas station made lease payments to Hesterman until July 1977, when it was notified of the

IRS's conflicting claim. The IRS promptly served Hesterman with notices of levy requiring him to pay over to the government, in satisfaction of the estates' unpaid taxes, the lease payments that he had already received. Pet. App. A5-A6. Hesterman refused to honor the levies, contending that he was not in possession of any property or rights to property belonging to the Bazinetts' estates. See I.R.C. § 6332(a).

2. The lessee filed this interpleader action in state court, subsequently removed to federal district court, to determine the priority, as between Hesterman and the IRS, to the lease payments. The district court held that the IRS was entitled to nothing and that Hesterman was entitled both to the interpleaded funds and to future payments under the lease (Pet. Supp. App. A31-A35). It pointed out that the IRS had not properly refiled notices of its gift tax liens under Section 6323(g), and that, under Section 6323(a), "[t]he lien imposed by [S]ection 6321 shall not be valid against any purchaser * * * until notice thereof * * * has been [properly] filed." The court further held that Hesterman was a bona fide "purchaser" of the gas station within the meaning of Section 6323, even though he had not paid full value and even though the executor had failed to have the sale approved by the probate court (Pet. Supp. App. A32-A33). On that basis, the court ruled that Hesterman's claim to the lease payments had priority over the IRS's unfiled tax liens. The court also held that the special estate tax lien established by Section 6324 of the Code had lapsed because the IRS did not reduce that lien to judgment within the prescribed ten-year period (Pet. App. A33-A34).

The court of appeals unanimously reversed (Pet. App. A1-A19). The court first held that the untimely refiling of the notices of gift tax lien did not cause the government to lose its priority over Hesterman, since the IRS had served notices of levy on Hesterman during the life of the original

liens and prior to the expiration of the statute of limitations on collection of the assessed taxes (*id.* at A6-A8). The court pointed out that "Hesterman obtained the [gas station] while the March 1973 lien for gift taxes was still in effect," that Hesterman "had notice of the IRS lien when he purchased the gas station," and that Hesterman "was in possession of property in which the government had a valid security interest when the levy was made" (*id.* at A8).

With respect to the special estate tax lien, the court said that there was a debatable question whether the government was entitled to enforce that lien by levy during the ten-year period provided by I.R.C. § 6324, as it did here, or whether the lien had lapsed because the government failed to reduce its claim to judgment in a judicial proceeding before the expiration of the ten-year period (Pet. App. A8-A12). The court ruled, however, that it did not need to decide this issue because the executor "did not convey to Hesterman a purchaser's right of ownership" (*id.* at A12). The court explained that, under Section 755 of the California Probate Code (West 1956 & Supp. 1987), "[t]he sale of the gas station and assignment of the lease were invalid because [the executor] failed to obtain the probate court's approval of the transaction" (*id.* at A12). The court noted that, under California law, "the manifest purpose of having the probate court supervise sales of property is to protect creditors of an estate from abuse of executorial discretion," and that Hesterman, "[h]aving purchased real property and the right to rental payments from the executor of an estate, [was] charged with notice that no title would pass until the probate court confirmed the sale" (*id.* at A15). The court rejected Hesterman's argument that "the government, which played no role in the transfer of the disputed property, [could] be estopped from arguing that the sale was void" (*id.* at A16). It accordingly ruled that the IRS could collect the Bazinetts' estate taxes by valid levy on the property in Hesterman's hands.

For these reasons, the court of appeals reversed the judgment of the district court (Pet. App. A17). Hesterman's estate, petitioner here, filed a petition for rehearing, which was denied on July 16, 1983. Petitioner did not seek certiorari, and the court of appeals' judgment thereupon became final.

3. In November 1983, the government filed a motion in the district court for entry of judgment in accordance with the court of appeals' mandate. Petitioner opposed that motion and moved for a new trial. The district court denied petitioner's motion and entered judgment for the United States, holding, in accordance with the court of appeals' opinion, that the IRS was entitled both to the interpleaded funds and to future payments under the gas station lease (Pet. Supp. App. A39-A40).

Petitioner again appealed, and the court of appeals, in an unpublished memorandum, "affirm[ed] on the ground that [its] prior opinion determined all litigable issues" (Pet. App. A23). The court noted that its prior opinion "established the law of the case," which required the district court to enter judgment for the government (*id.* at A24-A26). The court held that the district court had correctly refused to conduct a new trial, inasmuch as "the prior opinion decided all of the issues in the case" (*id.* at A25). Finally, the court of appeals rejected the contention that its prior opinion had been undermined by this Court's intervening decision in *United States* v. *Whiting Pools, Inc.*, 462 U.S. 198 (1983). The court explained that that decision "has no relevance to the instant case," since the court of appeals had based its prior opinion on a finding that "Hesterman did not hold good title to the transferred property" and had expressly declined to decide "whether the government had taken sufficient steps to protect its tax liens" (Pet. App. A30). As a result, petitioner's contention based on *Whiting Pools*—that the government by its levy had not obtained an ownership interest in the gas station—was immaterial (Pet. App. A30).

ARGUMENT

1. Petitioner seeks to present a number of questions about the priority of federal estate and gift tax liens. We do not believe that any of these questions is properly presented here. The court of appeals in its first opinion rejected all of petitioner's arguments in this respect, and that opinion became final when petitioner failed to seek certiorari from it. The court of appeals did not remand the case for further proceedings in the district court, and the district court's entry of judgment in accordance with the court of appeals' mandate was a purely ministerial act. Petitioner sought on its second appeal to relitigate the questions resolved against it in its first appeal, and the court of appeals properly held that such relitigation was barred by the law-of-the-case doctrine. Under these circumstances, petitioner's contentions are not properly before this Court now.

2. In any event, petitioner's contentions are devoid of merit. The only question in this case is whether petitioner or the IRS has a superior claim to the gas station lease payments. The district court originally held that Hesterman was a bona fide "purchaser" of the gas station and that his claim had priority over the government's unperfected tax liens. The court of appeals reversed, holding that Hesterman was not a "purchaser" because the executor's conveyance of the gas station to him was invalid as a matter of California law, with the result that he never acquired good title to the property. In view of that holding as to California law, the IRS did not need to rely on its tax liens, perfected or unperfected, in order to prevail against petitioner. The gas station and its rentals, rather, remained the property of the Bazinetts' estates; and once the IRS had assessed estate and gift taxes against the Bazinetts' estates, it was free to collect those taxes from the property in question notwithstanding any claim by petitioner.

In short, the only question presented here, if one assumes that any question is properly presented, is whether the court of appeals correctly construed the California Probate Code in ruling that Hesterman failed to acquire a valid interest in the gas station, or in the leasehold income from the gas station, because the Bazinetts' executor failed to secure approval of the probate court before conveying that property to him. This construction of state law obviously presents no issue warranting this Court's attention. See, *e.g.*, *Butner* v. *United States,* 440 U.S. 48, 51, 57-58 (1979).[1]

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[1] In any event, there is no merit to petitioner's contention that the government's liens were no longer valid. In *United States* v. *Whiting Pools, Inc.*, 462 U.S. 198 (1983), this Court rejected the government's claim that a levy automatically transferred ownership of the levied-upon property to the government, but the Court acknowledged that the levy did transfer "legal custody" of the property to the government (*id.* at 211). The United States was free to enforce its liens by way of levy pursuant to Section 6331 of the Code, and that levy, which conveyed "legal custody" to the government, was plainly sufficient to prevent expiration of the liens. Contrary to petitioner's contention (Pet. 6-8, 12), *United States* v. *Cleavenger,* 517 F.2d 230 (7th Cir. 1975), is not inconsistent with our submission on this point. *Cleavenger* held that the commencement of a judicial proceeding that did not culminate in a judgment within ten years would not prevent the special estate tax lien from expiring. In *Cleavenger,* however, the lien had not been enforced by levy during the ten-year period, and hence the court there had no occasion to consider what the effect of such a levy would be.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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